

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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DENNIS MONTGOMERY and the
MONTGOMERY FAMILY TRUST,

Plaintiffs,

v.

ETREPPID TECHNOLOGIES, LLC;
WARREN TREPP; and the UNITED
STATES DEPARTMENT OF DEFENSE,

Defendants.

AND ALL RELATED MATTERS.

3:06-CV-00056-PMP-VPC
BASE FILE

3:06-CV-00145-PMP-VPC

ORDER

Presently before the Court is Dennis Montgomery and the Montgomery Family Trust's ("Montgomery") Notice of Motion and Motion to Dismiss eTreppid's Counterclaim Re Non-Statutory Trade Secret Claims Pursuant to Federal Rule of Civil Procedure 12(b)(6) (Doc. #413), filed on January 22, 2008. eTreppid Technologies, Inc. and Warren Trepp ("eTreppid") filed an Opposition (Doc. #426) on February 11, 2008. Montgomery filed a Reply (Doc. #446) on February 25, 2008.¹

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¹ Montgomery also filed a Motion for Judgment on the Pleadings Re: eTreppid's Non-Statutory Trade Secret Tort Claims (Doc. #325). This motion was directed at eTreppid's prior Counterclaim. Because eTreppid since has filed a new Counterclaim, the Court will deny this motion as moot.

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2 **I. BACKGROUND**

3 This case concerns a dispute between eTreppid and Montgomery as to who owns
4 certain computer software source code. At issue in the present motion are eTreppid's non-
5 statutory state law tort claims asserted in eTreppid's Counterclaim (Doc. #393).
6 Specifically, the Montgomery parties argue eTreppid's claims in counts three, four, five,
7 seven, nine, ten, and eleven are preempted by Nevada's Uniform Trade Secrets Act because
8 they arise out of the same factual allegations as eTreppid's misappropriation of trade
9 secrets claim. eTreppid responds that its other tort claims include conduct beyond
10 Montgomery's alleged misappropriation of trade secrets, and therefore the Act does not
11 preempt the claims. Additionally, eTreppid argues that even if the claims are duplicative,
12 eTreppid may plead in the alternative under Federal Rule of Civil Procedure 8.

13 In the Counterclaim, eTreppid alleges it is in the business of developing and
14 marketing software, including software for data compression, pattern recognition, object
15 tracking, and anomaly detection. (Countercl. [Doc. #393] at 13.) The software is written in
16 human readable computer language known as source code. (*Id.* at 9.) The Counterclaim
17 defines the term "eTreppid Source Code" as "the source code which comprises eTreppid's
18 digital compression products, including data compression, pattern recognition, object
19 tracking and anomaly detection and other related functions." (*Id.* at 9, 13.) eTreppid
20 contends it took measures to protect access to its Source Code, including limiting the
21 storage of the Source Code to two password-protected servers and computer workstations.
22 (*Id.* at 14.) Only Montgomery and one other eTreppid employee knew the password. (*Id.*)
23 These computers were stored in a room accessible by only a few employees. (*Id.*) In
24 addition to this security, eTreppid controlled access to its building and had an alarm
25 system. (*Id.*)

26 eTreppid alleges it permitted its employees to work on portions of the eTreppid

1 Source Code from a shared directory, but only Montgomery, eTreppid's Chief Technology
2 Officer, had access to the complete eTreppid Source Code. (Id. at 9, 11, 15.) According to
3 the Counterclaim, Montgomery began deleting eTreppid Source Code files in December
4 2005. (Id.) eTreppid contends Montgomery removed one of the backup workstations used
5 to store the Source Code and Montgomery deleted the Source Code from the eTreppid
6 servers and the employees' workstations. (Id. at 16.) eTreppid discovered the Source Code
7 was deleted in January 2006 and thereafter terminated Montgomery's employment. (Id. at
8 16-17, 19.) eTreppid alleges that as a result of Montgomery deleting its Source Code,
9 eTreppid's employees' ability to perform their work on customer projects is limited,
10 eTreppid is unable to obtain contracts with interested customers, and also has been
11 "precluded from doing business with certain of its prior customers because they had been
12 brought into this litigation by Montgomery." (Id. at 18-19.)

13 On March 6, 2006, Federal Bureau of Investigation ("FBI") agents searched
14 Montgomery's residence and rented storage units. (Id. at 18.) The FBI seized, among
15 other things, computer hard drives. (Id.) eTreppid contends twenty-seven of these hard
16 drives belong to eTreppid, as documented by the serial numbers and eTreppid's receipts.
17 (Id.)

18 eTreppid initially brought an action against Montgomery in state court, where it
19 obtained a preliminary injunction restraining Montgomery from "destroying,
20 hypothecating, transferring, modifying and/or assigning the eTreppid Source Code, [and]
21 from discussing any eTreppid technology, including anomaly detection and pattern
22 recognition software, with any third-party." (Id. at 19.) eTreppid contends that after it
23 terminated Montgomery's employment in January 2006, and after the preliminary
24 injunction took effect, Montgomery discussed the eTreppid technology with potential
25 investors, including Counterdefendants Edra Blixseth, Michael Sandoval, Opspring LLC,
26 and Atigeo LLC. (Id. at 19-20.) According to eTreppid, these individuals and entities

1 currently possess the eTreppid Source Code and are modifying and developing the Source
2 Code to market it to third parties. (Id. at 20.)

3 After eTreppid brought suit in Nevada state court, Montgomery brought suit in
4 this Court and then removed the state court action to this Court. The Court has
5 consolidated the actions. Based on the above allegations, eTreppid brings counterclaims
6 for misappropriation of trade secrets under Nevada Revised Statutes § 600A.010 et seq.,
7 breach of contract, conversion, breach of fiduciary duty, bad faith - tortious and contractual,
8 declaratory relief, intentional interference with contract, claim and delivery, civil
9 conspiracy, and intentional interference with prospective economic relations. Montgomery
10 moves to dismiss counts three, four, five, seven, nine, ten and eleven as preempted by the
11 Nevada Uniform Trade Secrets Act.

12 **II. DISCUSSION**

13 In considering a motion to dismiss, “all well-pleaded allegations of material fact
14 are taken as true and construed in a light most favorable to the non-moving party.” Wyer
15 Summit P’ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998) (citation
16 omitted). However, the Court does not necessarily assume the truth of legal conclusions
17 merely because they are cast in the form of factual allegations in the plaintiff’s complaint.
18 See Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). There is a
19 strong presumption against dismissing an action for failure to state a claim. Ileto v. Glock
20 Inc., 349 F.3d 1191, 1200 (9th Cir. 2003). ““The issue is not whether a plaintiff will
21 ultimately prevail but whether the claimant is entitled to offer evidence to support the
22 claims.”” Hydrick v. Hunter, 500 F.3d 978, 985 (9th Cir. 2006) (quoting Scheuer v.
23 Rhodes, 416 U.S. 232, 236 (1974)). A plaintiff must make sufficient factual allegations to
24 establish a plausible entitlement to relief. Bell Atl. Corp. v Twombly, 127 S. Ct. 1955,
25 1965 (2007). Such allegations must amount to “more than labels and conclusions, and a
26 formulaic recitation of the elements of a cause of action.” Id. at 1964-65.

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2 **A. Preemption**

3 Nevada's Uniform Trade Secrets Act prohibits the misappropriation of trade
4 secrets and provides for a private right of action for damages and injunctive relief. See
5 Nev. Rev. Stat. § 600A.010 et seq. The Act contains a provision indicating it displaces
6 certain conflicting tort remedies:

7 1. Except as otherwise provided in subsection 2, this chapter displaces
8 conflicting tort, restitutionary, and other law of this state providing
9 civil remedies for misappropriation of a trade secret.

10 2. This chapter does not affect:

11 (a) Contractual remedies, whether or not based upon
12 misappropriation of a trade secret;

(b) Other civil remedies that are not based upon
misappropriation of a trade secret; or

(c) Except as otherwise provided in NRS 600A.035, criminal
sanctions, whether or not based upon misappropriation of a trade
secret.

13 Nev. Rev. Stat. § 600A.090. The Act precludes common law tort claims arising from a
14 "single factual episode" of misappropriation of a trade secret. Frantz v. Johnson, 999 P.2d
15 351, 357-58 (Nev. 2000); Hutchison v. KFC Corp., 809 F. Supp. 68, 71-72 (D. Nev. 1992)
16 (dismissing various common law tort claims as precluded by the Act). However, Nevada's
17 Uniform Trade Secrets Act does not provide a "blanket preemption to all claims that arise
18 from a factual circumstance possibly involving a trade secret." Frantz, 999 P.2d at 357 n.3.
19 If the plaintiff asserts claims that "do not depend on the information at issue being deemed
20 a trade secret," the Act will not preclude those claims. Id.

21 Pursuant to Federal Rule of Civil Procedure 8, "[a] party may set out 2 or more
22 statements of a claim or defense alternatively or hypothetically, either in a single count or
23 defense or in separate ones." Even if any of the above claims are duplicative of the
24 misappropriation of trade secrets claim and therefore preempted by the Nevada Unfair
25 Trade Secrets Act, eTreppid is entitled to plead the claims in the alternative under Rule 8.
26 eTreppid cannot recover on both types of claims. See Frantz, 999 P.2d at 357-58 (finding

1 district court erred in awarding damages on both statutory and common law claims based
2 on a misappropriation of trade secrets). However, it may plead the statutory and non-
3 statutory claims in the alternative at this stage of the proceedings, and it therefore would be
4 premature to dismiss eTreppid's common law claims.² The Court will deny Montgomery's
5 motion to dismiss on this basis.

6 **B. Count Three - Conversion**

7 Montgomery argues eTreppid fails to state a conversion claim because a claim
8 for conversion of an intangible asset will not lie. See Custom Teleconnect, Inc. v. Int'l
9 Tele-Serv., Inc., 254 F. Supp. 2d 1173, 1182 (D. Nev. 2003) ("Courts have traditionally
10 refused to recognize conversion of intangible assets that are not merged with something
11 more tangible."). eTreppid's conversion claim alleges Montgomery converted "eTreppid
12 Confidential Information (including, but not limited to, email files and the eTreppid Source
13 Code) and other property." (Countercl. at 22.) With respect to the "other property," the
14 Counterclaim alleges Montgomery removed one of the backup workstations used to store
15 the Source Code and took eTreppid hard drives as demonstrated by the items the FBI
16 seized. (Id. at 18-19.) eTreppid has alleged Montgomery converted tangible items in the
17 form of a computer workstation and hard drives, as well as intangible electronic
18 information merged with the tangible hard drives. The Court therefore will deny
19 Montgomery's motion to dismiss count three.

20 **C. Count Seven - Interference with Contract**

21 Montgomery argues the Court should dismiss this claim because it does not
22 allege eTreppid had a valid and existing contract. Montgomery also argues eTreppid fails
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24 ² Although this Court dismissed conflicting common law claims as preempted by the Nevada
25 Uniform Trade Secrets Act in another action, it is unclear from the opinion in that case whether the
26 plaintiff argued he was entitled to plead in the alternative under Rule 8. See Hutchison, 809 F. Supp.
at 71-72.

1 to state a claim because it relies on Montgomery bringing suit against third parties and
 2 Montgomery has a constitutional right to petition the government for redress of grievances.
 3 To establish an intentional interference with contractual relations, a plaintiff must show (1)
 4 a valid and existing contract; (2) the defendant knew of the contract; (3) the defendant
 5 committed intentional acts intended or designed to disrupt the contractual relationship; (4)
 6 the defendant's conduct actually disrupted the contract; (5) resulting in damage. J.J. Indus.,
 7 LLC v. Bennett, 71 P.3d 1264, 1267 (Nev. 2003).

8 The Counterclaim alleges Montgomery knew of certain contracts between
 9 eTreppid and third parties, including LLH & Associates, and Montgomery interfered with
 10 the contractual relationship between eTreppid and "each and every third party with which
 11 eTreppid had a contract" (Countercl. at 25.) Montgomery's assertion that the claim
 12 does not allege an existing contract therefore is incorrect. Further, eTreppid's claim is not
 13 based solely on Montgomery's actions in joining certain parties to a lawsuit. eTreppid also
 14 alleges Montgomery deleted all versions of eTreppid's Source Code from eTreppid's
 15 computers and failed to make backup disks as he stated he had been doing, thereby limiting
 16 eTreppid's ability to perform work for its customers. (Id. at 16-18.) The Court therefore
 17 will deny Montgomery's motion to dismiss count seven.

18 **D. Count Eleven - Interference with Prospective Economic Advantage**

19 Montgomery argues this claim fails to state a claim because the Counterclaim
 20 alleges Montgomery was justified in his alleged interference due to his claim he owns the
 21 Source Code. The intentional interference with prospective economic relations claim
 22 alleges eTreppid had prospective contractual relationships with third parties with respect to
 23 the technology and Source Code, Counterdefendants knew of these prospective
 24 relationships, they intended to prevent eTreppid from entering these relationships, and they
 25 acted without privilege or justification in interfering with eTreppid's prospective
 26 relationships. (Id. at 27-28.) Elsewhere, the Counterclaim asserts "Montgomery claims to

own some or all of the eTreppid Source Code and other eTreppid Confidential Information, through his association with and control of the Montgomery Family Trust.” (Id. at 10.)

To establish the tort of interference with prospective business advantage, a plaintiff must show:

(1) a prospective contractual relationship between the plaintiff and a third party; (2) the defendant’s knowledge of this prospective relationship; (3) the intent to harm the plaintiff by preventing the relationship; (4) the absence of privilege or justification by the defendant; and, (5) actual harm to the plaintiff as a result of the defendant’s conduct.

Consol. Generator-Nevada, Inc. v. Cummins Engine Co., Inc., 971 P.2d 1251, 1255 (Nev. 1998). However, the allegation that Montgomery has claimed he owns the Source Code does not establish Montgomery was justified or privileged in his alleged interference. For example, Montgomery’s claim to ownership could have been knowingly false. Such a claim would not amount to justification or privilege. The Court therefore will deny Montgomery’s motion to dismiss count eleven.

III. CONCLUSION

IT IS THEREFORE ORDERED that the Montgomery Parties’ Motion for Judgment on the Pleadings Re: eTreppid’s Non-Statutory Trade Secret Tort Claims (Doc. #325 is hereby DENIED as moot.

IT IS FURTHER ORDERED that Dennis Montgomery and the Montgomery Family Trust’s Notice of Motion and Motion to Dismiss eTreppid’s Counterclaim Re Non-Statutory Trade Secret Claims Pursuant to Federal Rule of Civil Procedure 12(b)(6) (Doc. #413) is hereby DENIED.

DATED: April 7, 2008.


 PHILIP M. PRO
 United States District Judge